UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10165-RWZ

IN RE: TRANSKARYOTIC THERAPIES, INC.
SECURITIES LITIGATION

MEMORANDUM OF DECISION

November 28, 2005

ZOBEL, D.J.

Shareholders in Transkaryotic Therapies ("TKT") filed a class action lawsuit against TKT, two former officers, six directors and four investment banks that underwrote TKT common stock offerings (collectively, "defendants"). Lead plaintiffs include Forstmann Asset Management LLC ("Forstmann"); Market Street Securities, Inc. ("Market Street"); City of Philadelphia, Board of Pensions and Retirement ("Philadelphia"); and Louisiana School Employees Retirement System ("Louisiana") (collectively, "lead plaintiffs"). The complaint originally contained four counts alleging violations of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"). On motion by defendants, the court dismissed Counts 1 and 2 regarding Sections 11, 12(a)(2) and 15 of the Securities Act except as brought by Sarah O. Buttner, an individual plaintiff. Subsequently, lead plaintiffs voluntarily dismissed Ms. Buttner's remaining claims, thereby eliminating Counts 1 and 2 in their entireties. Counts 3 and 4 remain and allege misrepresentations and material misstatements by defendants regarding the status of TKT's drug development, in violation of sections 10(b) and 20(a) of the Exchange Act.

Lead plaintiffs claim to have suffered monetary loss as a result of defendants' fraud, because they traded TKT stock in reliance on the integrity of the market. (See Compl. ¶ 250). The "fraud-on-the-market" theory enables lead plaintiffs to presume "an investor's reliance on any public material misrepresentations," in establishing a violation of the Exchange Act, instead of having to demonstrate individual reliance on defendants' alleged misstatements. See Swack v. Credit Suisse First Boston, 230 F.R.D. 250, 260 (D. Mass. 2005). Lead plaintiffs now move for class certification. Defendants oppose by challenging the typicality and adequacy of lead plaintiffs' representation and by asserting alternative dates for the class period, thereby disqualifying certain lead plaintiffs whose purchases of TKT stock occurred outside the alternative class period.

1. Class Certification

In order to qualify for class certification, lead plaintiffs must establish the elements of numerosity, commonality, typicality and adequacy of representation. See Fed. R. Civ. P. 23(a), and Smilow v. Southwestern Bell Mobile Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2004). Additionally, lead plaintiffs must demonstrate either that (1) proceeding without class certification may create incompatible standards of conduct for defendants or adverse precedent for subsequent plaintiffs, (2) defendants acted in a manner that affected the class as a whole, thereby making appropriate the application of a remedy as to the entire class, or (3) that common questions predominate over individual issues, and class certification offers a superior method for addressing these

common questions. See Fed. R. Civ. P. 23(b), and Smilow, 323 F.3d at 38. Of these three possible positions, lead plaintiffs have alleged the third.

Defendants do not contest plaintiffs' arguments in support of numerosity, commonality, and the 23(b) factors of predominance and superiority. With respect to numerosity, in the context of securities litigation, often the "exact number of Class members is unknown . . . and can only be ascertained through appropriate discovery." Swack, 230 F.R.D. at 258. Other measures may be used to approximate class size. For example, "how many shares of stock were outstanding" and "the average daily trading volume during the Class Period [are] both factors commonly considered by courts when finding the numerosity prong satisfied despite the absence of specific information about the number of individuals who purchased the stock during the relevant period." Id. at 258-59. According to lead plaintiffs, 34.3 million shares of TKT common stock remained outstanding on January 4, 2001, the starting date for lead plaintiffs' proposed class period, and were subject to active trading throughout the class period. (See Pls.' Mem. Supp. Mot. for Class Cert. 10.) Lead plaintiffs thus conclude that the proposed class of TKT shareholders contains "thousands of geographically dispersed members," and neither defendants nor this court disagrees. Id. Numerosity is established.

Lead plaintiffs have also successfully demonstrated commonality without objection by defendants. "The threshold of commonality is not a difficult one to meet," especially when "there are a number of common issues of fact and law that the class members would be required to establish to prove the defendants' liability, as well as

their entitlement to damages." In Re Relafen Antitrust Litig., 231 F.R.D. 52, 69 (D. Mass. 2005). Lead plaintiffs have identified several such issues, including whether defendants violated federal securities laws, whether defendants made misrepresentations about TKT's business and financial operations, and whether class members suffered damages. (See Pls.' Mem. Supp. Mot. for Class Cert. 11).

Nor do the parties dispute the 23(b) requirement that common issues predominate and that a class action offers the superior means for resolving these issues. The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 623 (D. Mass. 1997). The Rule intends to ensure "merely that common issues predominate, not that all issues be common to the class." Smilow, 323 F.3d at 39. Lead plaintiffs assert that such common issues prevail, except perhaps as to damages, and defendants do not argue otherwise. Moreover, although individual damages claims may arise, "where, as here, common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain." Id. at 40. As to superiority, a class action is appropriate when

> the piecemeal adjudication of numerous separate lawsuits covering the same or substantially similar issues – i.e., the [d]efendants' allegedly illegal conduct and the impact thereof on the market price of [TKT] stock – would be an inefficient allocation of limited court resources. Furthermore, and even more importantly, is the very real risk that potential class members with relatively small claims would not have the financial incentives or wherewithal to seek legal redress for their injuries.

Swack, 230 F.R.D. at 273. Lead plaintiffs cite these reasons in addition to benefits from concentrating the claims of geographically dispersed TKT shareholders and avoiding potentially inconsistent adjudications. Predominance and superiority are thus sufficiently demonstrated.

Defendants do not concede, however, that lead plaintiffs are sufficiently typical or adequate, as required under Rule 23(a). In general, "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." In re Pharm. Indus. Average Wholesale Price Litig., 230 F.R.D. 61, 78 (D. Mass. 2005). "To establish typicality regarding reliance in a case brought under the fraud-on-the-market theory, the putative class representative must establish that she relied upon the integrity of the market in purchasing the securities at issue." Swack, 230 F.R.D. at 261. Reliance upon "information that is not generally available to the public, and hence to the unnamed class representatives" may indicate that a plaintiff did not rely upon market integrity. Grace v. Perception Tech. Corp., 128 F.R.D. 165, 169 (D. Mass. 1989). However, exposure to "variegated sources of information does not dictate the conclusion that [a plaintiff] did not rely upon the integrity of the market." Swack, 230 F.R.D. at 261.

According to defendants, Market Street engaged in short selling and day trading of TKT stock based on complex mathematical models, thereby avoiding reliance on market integrity and, instead, often gambling that TKT stock would decline. (See Def. TKT's Opp. 22-23). With respect to Forstmann, Philadelphia and Louisiana,

defendants accuse them of participating in non-public meetings and conversations with TKT senior management and, thus, possibly relying upon non-public material information about TKT that differed from publicly released updates, rather than upon the integrity of the market. (See id. at 32-33). Defendants assert further that Market Street and Forstmann are atypical as a result of their purchases of TKT stock after the end of the class period. (See id. at 21). Lead plaintiffs, on the other hand, argue that Market Street relied on market integrity as a significant, if not the sole, source of guidance in its investment decisions and applied its models not only to identify stock purchases but also to mitigate losses by re-investing in falling stock in order to balance great losses with smaller ones. (See Pls.' Reply Mem. 15-19). Lead plaintiffs dispute defendants' characterization of their trading as selling short and further assert that information obtained from TKT senior management did not contain any non-public material data. (See id. at 19-23).

The fact that certain lead plaintiffs may be met by unique defenses does not necessarily interfere with class certification, however. "The claim by [d]efendants that [lead plaintiffs] fail on the typicality prong because [they are] subject to a unique defense of non-reliance presupposes that this defense would be raised and fully litigated in conjunction with the resolution of the fraud-on-the-market issue." Swack, 230 F.R.D. at 263. Instead, the trial may be bifurcated, so that

> [a]fter first taking up the class-wide issue of fraud-on-the-market, a damages phase could follow if the trier of fact returned a verdict for the class. During this second phase, in which the plaintiff class would be parsed in various ways based upon the precise claims of its members, the

> [d]efendants would have the opportunity to raise specific defenses against
> individual plaintiffs or groups of plaintiffs.

Id. This option offers the means to preserve zealous representation by lead plaintiffs on behalf of the class as to liability under common theories and facts while avoiding a trial skewed towards unique defenses of lead plaintiffs and "prejudicing the absent class members." Id. Additionally, "[t]his mechanism would seem to allow for the most efficient allocation of resources, streamlining the development of class-wide issues and reserving specific disputes regarding defenses and damages for resolution in subsequent, more tailored proceedings." Id.

Defendants' contentions regarding adequacy of Market Street and Forstmann do not defeat class certification, either. To demonstrate adequacy, lead plaintiffs must show "first that the interests of the representative party will not conflict with the interests of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." Andrews v. Bechtel Power Corp., 780 F.2d 124, 130 (1st Cir. 1985). No dispute has been raised about the competency of lead plaintiffs' counsel, and their proficiency has been evident throughout these proceedings. Instead, defendants pursue the first prong by assailing Market Street and Forstmann's alleged lack of control over the instant litigation, neglect to communicate with other members of the class, failure to negotiate a specific fee arrangement with counsel and general lack of understanding regarding the claims. (See Def. TKT's Opp. 28-32, 34-35). Naturally, lead plaintiffs disagree and characterize Market Street and Forstmann's deposition testimonies as

demonstrating sufficient knowledge of the case and its handling. (See Pls.' Reply Mem. 23-27).

"In complex actions such as this one, named plaintiffs are not required to have expert knowledge of all details of the case, . . . and a great deal of reliance on the expertise of counsel is to be expected." In re Lupron Marketing and Sales Practices Litigation, 228 F.R.D. 75, 90 (D. Mass. 2005) (internal quotation marks omitted), quoting, County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1416 (E.D. N.Y. 1989). "'The conflict that will prevent a plaintiff meeting the [adequacy of representation] prerequisite must be fundamental, and speculative conflict should be disregarded at the class certification stage.'" In re Pharm. Indus., 230 F.R.D. at 81, quoting, Visa Check / MasterMoney Antitrust Litig., 280 F.3d 124, 145 (2d Cir. 2001). At the present stage of litigation, the record does not indicate any fundamental conflicts that would prevent either Market Street or Forstmann from providing adequate representation. The person responsible for investment decisions at Market Street, Stephen Cheseldine, sufficiently identified the range of responsibilities owed by a class representative. (See Levin Aff. Ex. 21 – Cheseldine Dep. at 162.) He testified that he has read much of the documentation provided to him for review by counsel. (See Levin Aff. Ex. 21 – Cheseldine Dep. at 161.) Although he had not personally communicated with class members as of the time of deposition, he recognized class communication as a duty of the class representative. (See Levin Aff. Ex. 21 – Cheseldine Dep. at 162-163.) Similarly, Forstmann reviewed the litigation documents, albeit primarily, the night before his deposition. (See Levin Aff. Ex. 4 – Forstmann Dep. at 162-163.) He

discussed his participation in the lawsuit as, so far, giving deposition testimony and monitoring counsel. (See Yarnoff Aff. Ex. 3 – Forstmann Dep. at 181-182.) Both Market Street and Forstmann demonstrated an understanding of the duties owed by a lead plaintiff and an intent to carry these out responsibly. Accordingly, defendants' claims of inadequacy are not persuasive.

Lead plaintiffs have satisfactorily demonstrated the Rule 23(a) and (b) factors required to be certified as a class. In order to address defendants' concerns regarding typicality, the court will consider bifurcating the trial, liability to be tried first, followed by damages.

2. Class Period

In their pending motion, lead plaintiffs propose January 4, 2001, through January 10, 2003, as the appropriate time frame for the class period. Defendants counter with a period that ends on October 2, 2002, on the ground that TKT released curative information on that date sufficient to alert stockholders and purchasers to impending problems with drug development. The practical impact of defendants' shortened class period would be to eliminate Market Street as a lead plaintiff, since all of its TKT stock purchases occurred after October 2, 2002. Defendants would also seek to disqualify Forstmann, Philadelphia and Louisiana as lead plaintiffs on the basis of their each purchasing TKT stock both before and after October 2, 2002, thereby allegedly rendering them atypical. (See Def. TKT's Opp. 17-21).

Whether TKT's October 2002 disclosure constituted a full and sufficient cure is hotly disputed by the parties and requires a level of fact-finding inappropriate at this stage of the litigation. See In re Polymedica Corp. Sec. Litig., 224 F.R.D. 27, 35 (D. Mass. 2004) (ruling that "any findings at the class certification stage may not in fact decide the merits"). Even the case law cited by defendants in support of shortening a class period on the basis of curative information revised the period only after summary judgment on the issue. See In re Biogen Sec. Litig., 179 F.R.D. 25, 41 (D. Mass. 1997) (explaining that "[g]enerally a Court does not consider the merits of a claim in determining class certification . . . however, the defendants have shown on summary judgment that any possibly misleading information that entered the market . . . was cured by [a certain date].") Lead plaintiffs' motion to certify a class based on the purchase and sale of TKT stock from January 4, 2001, through January 10, 2003, is therefore allowed.

_____ /s/ Rya W. Zobel

DATE RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE